Filed 2/25/05 Estate of Hammonds CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| Estate of LILLIE HAMMONDS, Deceased. | B165085<br><br>(Los Angeles County Super. Ct. No. BP072412) |
| GLORIA HAMMONDS,<br><br>Respondent,<br><br>v.<br><br>JUAN HERNANDEZ,<br><br>Appellant. | |

APPEAL from an order of the Superior Court of Los Angeles County. Hugh C. Gardner III, Judge. Reversed.

Mifflin & Associates and Ken Mifflin for Appellant.

Poindexter & Doutre, William M. Poindexter and Steven A. Berliner for Respondent.

This appeal arises from the trial court's ruling on a petition brought by respondent Gloria Hammonds (respondent) as the administrator of the estate of Lillie Hammonds (decedent) to determine title to real property owned by decedent prior to her death. Appellant Juan Hernandez (appellant) maintains title to the property transferred to him upon decedent's death because, before her death, decedent executed a living trust naming him trustee and a grant deed transferring the property to the trust and the trustee of the trust as joint tenants. Following a trial on the petition, the court ruled that, at the time decedent signed the trust document and grant deed conveying the property, she lacked the legal capacity to do so, and ordered that the property be considered a part of the decedent's estate. Appellant contends: (1) the evidence was insufficient to support the probate court's finding of incapacity; and (2) the probate court abused its discretion in finding incapacity. We reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

For many years prior to her death on March 5, 2002, at the age of 73, decedent lived at 4218 So. Western Avenue, which consisted of a house in front and three apartments in the back (the house). Appellant, who was a self-employed ironworker in his mid-30's, first met decedent in September 1992 when she asked him to do some wrought iron work for her at the house. Appellant moved into an upstairs apartment in the house that same month. A few weeks later, appellant moved into decedent's bedroom with her. Appellant did not pay rent, but he gave decedent all of the money he earned doing ironwork.[1] Decedent used that money to cover the household expenses and gave appellant spending money. In December 2001, decedent was diagnosed with stomach cancer.

On January 25, 2002, six weeks before she died, decedent retained paralegal Edward Leon Guy, III, to draft a living trust, pour over will and grant deed. In pertinent

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[1] Decedent would accompany appellant on his jobs and prepare estimates for him.

part, the trust document prepared by Guy reads: "This Living Trust Agreement . . . is made . . . between [decedent] (the "Grantor and Beneficiary") . . . and [appellant] (the "Trustee") . . . . [¶] In consideration of the mutual covenants and promises set forth in this Agreement, the Grantor and Trustee agree as follows: [¶] I. **PURPOSE** [¶] The purpose of this Agreement is to establish a Trust to receive and manage assets for the benefit of the Grantor during the Grantor's lifetime, to provide for the maintenance and care of the Grantor in the event the Grantor suffers a disability." The trust provided that, "Upon the death of the Grantor, and after the payment of the Grantor's funeral expenses, and just debts, the following distributions shall be made: [¶] A. **Residuary Assets.** The residuary assets of this Trust shall be transferred and distributed in accordance with the last will and testament of Grantor." The grant deed prepared by Guy provided: "Lillie Streeter, an unmarried woman hereby grants to THE LILLIE HAMMONDS LIVING TRUST and the TRUSTEE OF THE LILLIE HAMMONDS LIVING TRUST as joint tenants" the house. Although they were delivered to her within several weeks of her January 25 meeting with Guy, decedent did not immediately execute either the trust document or the grant deed.

On February 28, 2002, decedent began in-home hospice care. She was administered Fentanyl and Roxanol (a morphine derivative) for pain control. As decedent's pain increased over the next several days, her pain medication was increased. According to the nursing progress notes made by the visiting hospice nurses, decedent's mental state was deteriorating. By March 1, 2002, she was characterizing her pain intensity at 10 on a scale of one to 10 and she was receiving 20 milligrams of Roxanol every four hours. She was, however, aware of her surroundings on that day and showing no signs of confusion.

At about 9:30 a.m. on March 2, 2002, a telephone call log from the hospice facility indicates that appellant called to report decedent was vomiting blood and requested that a nurse come to the house. That same morning, appellant telephoned Brad Pye, an old friend of decedent's, and asked him to come to the house. When Pye arrived, decedent asked Pye to look over the trust documents and the grant deed. In accordance with his

recommendation that the documents be signed and notarized, Pye contacted notary Tyona Renfen, who came to the house and notarized decedent's signature on the trust and grant deed at about 10:30 a.m.[2] The nursing progress notes for that day indicate that, at 12:45 p.m., decedent was "alert" but confused.

By the next day, according to the nursing progress notes, decedent's mental state had deteriorated to "disoriented" and confused with decreased responsiveness; she was described as "rambling, slurred speech." By March 4, 2002, decedent had declined further. According to the nursing progress notes for that day, she was agitated, confused, had decreased responsiveness, hallucinations, visions and terminal restlessness. She was " 'moaning' and crying out intermittently . . . does not respond to verbal stimulus . . . ."

Decedent died on March 5, 2002.[3] Upon her death, appellant called Herbert Walker, a former tenant and old friend of decedent's. Walker contacted decedent's relatives in North Carolina to inform them of her death. Those relatives contacted decedent's California relatives, including respondent, who then contacted decedent's niece by marriage, Shirley. When Shirley and Gloria went to the house that day, appellant showed them the trust papers and grant deed and told them that the house now belonged to him. When Gloria came back the next day to pick up clothes for decedent to be buried in, in a funeral in North Carolina, appellant would not allow her into the house. Gloria purchased the clothes herself and personally paid for decedent's body to be transported to North Carolina. A few days later, while appellant was in North Carolina at decedent's funeral, Gloria returned to the house. She was admiring some pots on top of the refrigerator and when she pulled one of the pots down, some papers fell. One of the

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[2] On the grant deed, the name "Streeter" is crossed out and the name "Hammonds" is handwritten below it. The letters "LH" and the numbers "3/2 02" are written next to the interlineations.

[3] She was survived by two brothers: Hubert and William Hammonds; three nieces: Gloria Hammonds, Malaika Hammonds and Evangeline Dorsey; and two nephews: Reginald Hammonds and Joseph Hammonds.

papers was a version of the grant deed on which, where it should have read "Lillie Streeter," there was whiteout.[4]

On March 28, 2002, respondent filed a petition for letters of special administration and authorization to administer decedent's estate under the Independent Administration of Estates Act with limited authority. She was appointed special administrator of decedent's estate. Her powers included taking possession of decedent's home and taking whatever actions were necessary to protect the home "including getting a restraining order against [appellant] from selling or recording title[,]" filing a quiet title action, collect rents, open a bank account and access decedent's safe deposit boxes to determine if there was a will.

On March 29, 2002, respondent filed a petition to determine title to the house. Trial on the petition was scheduled to commence on November 18, 2002. On November 12, 2002, a proof of holographic instrument was filed.[5]

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[4] Notary Renfen testified that the reason there was whiteout on the grant deed was that decedent initially signed it as Lillie Streeter, but since that name did not match the name on her identification, it had to be redone. Hence, the interlineations.

[5] The alleged holographic will consisted of a handwritten document dated May 24, 1974, which reads: "I Lillie Streeter Lundy: [¶] Being of sound mind and mentally alert, this May 24, 1974 9:30 p.m. would like to leave my will or make this a legal will leaving all of my personal property and Real Property location 4218 So. Western Ave. to Shirley Hammonds to do with as she wish. She has been a loyal & true friend, and niece, to me. A good wife and mother to her husband and son. I sign this as my last will until it can be drawn up by an attorney. if this has not been done, then this is a will of my own hand writing and must be accepted as same. [¶] Sign. Lillie Streeter Lundy [¶] May 24, 1974 [¶] In Los Angeles, Calif 90062 [¶] Place. 4218 So. Western. [¶] P.S. Shirley: [¶] If any pets please keep them if it doesn't work a hardship on you and family. [¶] Sign. Lillie Streeter Lundy [¶] 5/24/74." "Lundy" and "Streeter" were decedent's former married names. At the trial of the petition, Shirley testified that she and her husband, decedent's nephew Luther Hammonds, had lived with decedent for more than a year when they first moved to California in the late 1960's and always remained close to her, never living more than a few miles away. In 1974, decedent was planning to move out of state when she gave Shirley the will and told her to keep it in a safe place, Shirley put it in the fire safe box where she kept all of her important papers. Shirley did not then think of the document as a will, but as a letter. She had since forgotten about it, but while

At the trial of the petition, respondent's expert witness, Dr. Arthur Kowell, a neurologist, opined that decedent did not have the capacity to execute a testamentary trust and grant deed on March 2, 2002. Kowell, who never examined decedent, based his opinion on the nursing progress notes in decedent's medical chart kept by the hospice nurses. Those notes indicated that, although the decedent was alert (i.e., conscious) on March 2, 2002, she was confused; her pain medications had been increased beyond the level of normal pain management (which was not unusual for a patient in hospice care); and she was dehydrated. Further, the pain medications being administered were narcotics the known side effects of which included disorientation, confusion and obtunding, which would be magnified in a patient who weighed just 110 pounds and was already debilitated by stomach cancer. In addition, decedent was in renal failure and there was evidence of cardiac compromise which would result in less oxygen being delivered to her brain. Moreover, the fact that decedent appeared to be bleeding internally on March 2, 2002, would lead to an increased blood ammonia level and further confusion and impaired judgment. Kowell's opinion was further based on the fact that decedent's condition deteriorated rapidly over the following three days.

In support of his contention that decedent had the capacity to execute the trust document and grant deed on March 2, 2002, appellant presented the testimony of several friends and acquaintances of decedent who visited with her in the days immediately before her death, including the day she signed the trust document and grant deed documents, and all agreed that she seemed aware of what she was doing. Notary Renfen testified that decedent was in bed, but awake when Renfen arrived to notarize the documents. Decedent responded affirmatively when Renfen asked whether she understood that the documents she was signing gave away her property. Decedent talked about loving appellant.

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discussing the instant litigation with her son, Reggie, and with Gloria, Shirley remembered the letter and realized it was a will, so she gave the document to counsel.

Pye testified that, although decedent was in bed when he went to see her on March 2, 2002, she recognized Pye and talked with him about his children. Decedent told Pye she wanted appellant to "have everything" and wanted her relatives to not have anything. Pye saw decedent sign the papers. At decedent's request, appellant assisted her with her signature by holding the hand she was writing with. According to Augusta Kyles, another friend of Lillie's who was visiting at the time the notary arrived and remained through the document signing, Lillie would not have been able to sign anything unassisted.

Lona Stitt and decedent had been friends since 1992. Stitt, who lived next door to decedent, saw decedent almost everyday, including the days immediately before her death. When Stitt saw decedent on March 2, 2002, decedent was in bed and seemed weak, but she was alert. There was never a time that Stitt thought decedent was not in her right mind. On several occasions, decedent told Stitt that, since appellant had been there taking care of her and her family had not, she thought appellant should receive her property.

Longtime friend Herbert Walker testified that he was with appellant visiting decedent in the hospital when the doctor informed her of the diagnosis. Decedent told Walker not to contact any of her family members, that she would call someone in North Carolina. When, several weeks later, decedent asked Walker about a paralegal that had been doing some work for Walker, Walker put her in touch with Guy. When Walker visited decedent over the next several months, including the day before she died, she never appeared disoriented and was conversant. Sometime in February, decedent told Walker that she wanted appellant to have her property.[6]

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[6] Walker testified that he did not visit decedent on March 2, 2002, the day she signed documents. Kyle, however, testified that Walker arrived as Kyle was leaving that day, after the documents had been signed. Shirley testified that, several days after decedent's death, Walker told her that he had been there during the signing and "didn't like what he saw was going on and he saw [appellant] pick [decedent's] hand up to sign a document and he didn't like what he saw was going on and he got out of there."

Appellant testified that, in February 2002, decedent told him that she wanted him to have the house and to care for her 10 dogs and 18 cats. Appellant knew that decedent had been having problems with her California relatives since her brother had died several years before, but she did not mention them in relation to what she wanted done with her property. She did, however, tell appellant that her relatives "were going to take the dogs to the pound and put me in the street." On March 2, 2002, an hour before decedent executed the trust documents and grant deed, appellant had called the hospice facility in a panic because decedent had been vomiting blood and they were sending someone out to the house. Although required by the trust document to do so, appellant did not use decedent's assets to pay her funeral expenses, nor did he reimburse respondent for her payment of those expenses. On the fortieth day after decedent's death, appellant represented himself as her successor and withdrew the money she had in a bank account, but did not distribute it to her estate.

On January 15, 2003, the probate court found that, at the time decedent signed the trust documents and conveyance of title to the house, decedent "suffered from mental deficits so substantial that, under the circumstances, she lacked the legal capacity to perform the specific acts of signing the trust/conveyance documents for the property, pursuant to Probate Code sections 810, 811, and 812." This finding was expressly based on the testimony of respondent's expert witness, Kowell, and evidence that decedent was so weak at the time she was alleged to have signed the documents that appellant had to guide her hand.[7]

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[7] The probate court further found that the documents purported to be signed by decedent transferred the property to " 'The Lillie Hammonds Living Trust and the Trustee of the Lillie Hammonds Living Trust as joint tenants' without designating who each is to be." We find no merit in respondent's argument that, because appellant was not named as a beneficiary or grantee of the trust and grant deed, he cannot demonstrate prejudice from the alleged error and therefore has no standing to challenge the ruling. The trust document named appellant as trustee of the trust and the grant deed transferred the house to the trust and the trustee as joint tenants. Thus, as trustee, appellant had a beneficial interest in the house.

Appellant filed a timely notice of appeal from the January 15, 2003, order.[8]

## DISCUSSION[9]

Standard of Review

Appellant contends respondent failed to show that decedent lacked testamentary capacity when she executed the trust document and grant deed. He argues that the evidence presented by respondent's expert was not sufficient to overcome the presumption that decedent was of sound mind when she executed the documents, which presumption was supported by the testimony of several percipient witnesses to the signing. We agree.

There is a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions. (Prob. Code, § 810, subd. (a); see also *Estate of Fritschi* (1963) 60 Cal.2d 367, 372 [party claiming lack of capacity bears burden of showing testator was incompetent]; *Estate of Schwartz* (1945) 67 Cal.App.2d 512, 519-520.) Probate Code section 811 requires a determination that a person lacks the capacity to make a conveyance or to execute a trust be supported by evidence of a deficit in at least one of several specified

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**8** On March 24, 2003, the trial court sustained respondent's demurrer to appellant's contest of the holographic will, finding appellant was not an "interested person." On April 16, 2003, the court found that decedent had died testate and appointed respondent administrator with the holographic will annexed. On May 28, 2003, respondent's application for an order directing her to exercise her powers as a fiduciary as if no appeal were pending was granted, and respondent was directed to undertake eviction proceedings against appellant. Appellant was given the opportunity to stay the order with the filing a $240,000 bond. On June 19, 2003, appellant filed a petition for supersedeas seeking an order directing respondent to dismiss the unlawful detainer action she brought against appellant and allowing appellant to remain in the house as a rent-paying tenant. On August 5, 2003, we denied the petition.

**9** We discern no legal distinction between appellant's "substantial evidence" and "abuse of discretion" arguments. As we state in the text, the proper standard of review is substantial evidence. We consider all of appellant's arguments in that context.

mental functions. As relevant here, these mental functions include the person's level of consciousness; orientation to time, place, person and situation; and ability to attend and concentrate. Such deficit may be demonstrated by the presence of hallucinations or delusions.[10]

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[10] In its entirety, Probate Code section 811 provides: "(a) A determination that a person . . . lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to . . . make a conveyance . . . or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question: [¶] (1) Alertness and attention, including, but not limited to, the following: [¶] (A) Level of arousal or consciousness. [¶] (B) Orientation to time, place, person, and situation. [¶] (C) Ability to attend and concentrate. [¶] (2) Information processing, including, but not limited to, the following: [¶] (A) Short- and long-term memory, including immediate recall. [¶] (B) Ability to understand or communicate with others, either verbally or otherwise. [¶] (C) Recognition of familiar objects and familiar persons. [¶] (D) Ability to understand and appreciate quantities. [¶] (E) Ability to reason using abstract concepts. [¶] (F) Ability to plan, organize, and carry out actions in one's own rational self-interest. [¶] (G) Ability to reason logically. [¶] (3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following: [¶] (A) Severely disorganized thinking. [¶] (B) Hallucinations. [¶] (C) Delusions. [¶] (D) Uncontrollable, repetitive, or intrusive thoughts. [¶] (4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances. [¶] (b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question. [¶] (c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment. [¶] (d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act. [¶] (e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing

On review, the appellate court determines whether there was presented substantial evidence showing lack of capacity. (*Estate of Schwartz, supra*, 67 Cal.App.2d at p. 520.) To satisfy this test, the evidence " ' "must be reasonable in nature, credible, and of solid value. . . ." [Citation.]' [Citation.] It is an oftrepeated rule that an order challenged on appeal 'is presumed correct and all intendments and presumptions are indulged to support the order on matters to which the record is silent. It is appellant's burden to affirmatively demonstrate error and, where the evidence is in conflict, [the appellate] court will not disturb the trial court's findings. [Citation.]' [Citation.]" (*Cochran* v. *Rubens* (1996) 42 Cal.App.4th 481, 486; see also *Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1678; but see *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652 ["An appellate court need not 'blindly seize any evidence . . . in order to affirm the judgment.' "].) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record. [Citation.]" (*Ibid.*)

". . . Expert opinion testimony constitutes substantial evidence only if based on conclusions or assumptions supported by evidence in the record. Opinion testimony which is conjectural or speculative 'cannot rise to the dignity of substantial evidence.' [Citation.]" (*Roddenberry v. Roddenberry, supra*, 44 Cal.App.4th at p. 651.) A lay witness may testify to his or her opinion as to the sanity of a person when the witness is "an intimate acquaintance of the person whose sanity is in question." (Evid. Code, § 870, subd. (a).)[11] Finally, "When one has a mental disorder in which there are lucid periods, it

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in this part shall affect the decisionmaking process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision."

[11] We note that there is no precise definition for "intimate acquaintance." In *Estate of Rich* (1947) 79 Cal.App.2d 22, 27, the court found that witnesses who were old friends of the testatrix; on terms of social intimacy with her and, in the case of one of the witnesses, a person with whom the testatrix discussed her business affairs were " 'intimate acquaintances' under any definition of that term as employed in the code section. Because it is difficult to lay down any definite rule as to what constitutes an

is presumed that his will has been made during a time of lucidity. [Citation.]" (*Estate of Goetz* (1967) 253 Cal.App.2d 107, 114.)

The Trial Court's Decision is Not Supported by Substantial Evidence

The sole basis of the trial court's ruling was the evidence adduced from Kowell, respondent's expert witness. But Kowell's testimony does not constitute substantial evidence to overcome the presumption that decedent had the capacity to convey the house or to execute a trust the morning of March 2, 2002. Kowell's opinion was based on the evidence of the nursing progress notes which show that, at the time she executed the documents, decedent was under the influence of considerable amounts of narcotics and had other physical conditions which would lead to decreased consciousness, ability to concentrate and to process information. But, while the nursing notes may be sufficient to establish decedent did not have the capacity to convey the house or execute a trust at 12:45 p.m. on March 2, 2002, they do not establish her condition earlier that day. The only evidence of decedent's mental capacity at 10:30 a.m. on March 2, 2002, the time she actually executed the documents at issue, was that adduced from appellant, notary Renfen and decedent's friends Pye and Stitt. These percipient witnesses all agreed that decedent was conscious; oriented to time, place, person and situation; and had the ability to attend and concentrate. (Prob. Code, § 8111.) Under these circumstances, there was not substantial evidence to support the trial court's determination that decedent lacked legal capacity.

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'intimate acquaintance,' it has been repeatedly held by the courts of this state that the determination of that fact, under the statute, must be committed to the sound discretion of the trial court, and when that court has determined, from their testimony, that given witnesses were 'intimate acquaintances' and permitted them to express an opinion, an appellate tribunal will not interfere with the exercise of that discretion, unless there has been a clear abuse of it." Here, the trial court implicitly found that Guy and Renfen were "intimate acquaintances" within the meaning of the statute.

## DISPOSITION

The order is reversed. Appellant to recover his costs on appeal.

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RUBIN, J.

We concur:

COOPER, P.J.

FLIER, J.